

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0065, Jocelyn Scarpetti v. City of Manchester, the court on February 7, 2007, issued the following order:

The City of Manchester (city) appeals an order of the superior court that reversed a decision of the Manchester Planning Board (board) denying the property owner's application for subdivision. The city argues that: (1) the trial court erred in finding and relying upon "ongoing violations" of flood plain regulations to support its decision; (2) the trial court erred in finding that the board failed to consider the specifics of the applicant's lot; and (3) the trial court's findings with respect to the lot were neither lawful nor supported by the record. We reverse.

When a trial court's review of a planning board decision is appealed, we affirm the trial court's decision unless it is unsupported by the evidence or legally erroneous. Cherry v. Town of Hampton Falls, 150 N.H. 720, 723 (2004). The trial court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law, or the court is persuaded by the balance of probabilities, on the evidence before it that said decision is unreasonable. RSA 677:15 (Supp. 2006). The trial court may not substitute its judgment for that of the board. Cherry, 150 N.H. at 724.

In this case, the trial court found that the board's decision was unreasonable and that its denial represented "selective enforcement of floodplain regulations." The proposed lot was within the 100-year flood plain requiring special consideration of the potential flood risk. The court's conclusion that the board's denial constituted selective enforcement of flood plain regulations was based upon inferences that it drew after a view of the area and observations of new construction. We have not found and no party cites evidence to support a conclusion that approval for the cited construction had been obtained pursuant to the subdivision process. We therefore conclude that the trial court erred in finding selective enforcement based upon the new construction.

The trial court also found that the application was denied solely because the property is located within a flood plain district and that the board's decision was unreasonable because the board failed to consider ongoing violations in old construction. The court based its finding of ongoing violations solely upon its observations during its view of the area. Even if we assume that the court could properly draw conclusions about other property in the area, its comparison of

existing lot uses with a proposed use of a lot not yet in existence does not support its ruling. As we have previously noted, a planning board must look beyond the issue of zoning compliance and consider the community's future needs as well as the current and future fitness of the property to be subdivided. Patenaude v. Town of Meredith, 118 N.H. 616, 621 (1978). The issue before the board was not the contemplated use of an existing lot but rather the creation of a new one. The board found that the proposed lot was located within the flood plain and that its creation would place additional demands upon an already substandard infrastructure. There is evidence in the record indicating that a previous subdivision plan had been denied in 1994 and that no subdivisions had been approved in the area since 1991.

The board based its decision upon a valid zoning ordinance enacted to limit risk in a recognized flood plain. It was neither unreasonable nor unlawful to deny the landowner's request to create a new lot given the evidence before it. We therefore conclude that the trial court erred in reversing the board's decision. See Cherry, 150 N.H. at 724 (if any of board's reasons for denial support its decision, petitioner's appeal must fail).

Reversed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**